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No. 823

In the Supreme Court of the United States

OCTOBER TERM, 1959

SIMS MOTOR TRANSPORT LINES, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment entered on November 30, 1959, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. The judgment dismissed appellants' complaint, which sought to set aside an order of the Interstate Commerce Commission directing appellant to cease and desist from conducting certain motor carrier operations found to be unauthorized by its common carrier certificate.

QUESTION PRESENTED

Whether the Interstate Commerce Commission properly construed the motor carrier certificate held by appellant in determining that authority to transport "iron and steel articles" does not cover the transportation of "tractors, traction engines, tools and parts for tractors and traction engines, and used foundry machinery."

STATEMENT

This case involves the construction of a motor common carrier certificate issued to appellant in 1952, authorizing it to transport iron and steel articles or products [1] between specified points (App. 16a).[2] This certificate is a consolidation of a certificate issued to appellant's predecessor in 1941, extended in 1948, authorizing transportation of "iron and steel products" (*ibid.*) and certificates purchased by appellant, with Commission approval, in 1945 and 1948, authorizing transportation of "iron and steel products" and "iron and steel, and articles made thereof," respectively (*ibid.*).

In 1954, the Commission instituted an investigation to determine whether appellant was transporting commodities not authorized by its certificate. After full administrative proceedings, the Commission (Division 1) held that appellant had conducted unauthorized

[1] Specifically, the certificate authorizes the transportation of "iron and steel products," "iron and steel articles," and "iron and steel, and articles made thereof" (Pet. App. 41a).

[2] We use the designation "App" to refer to the Appendix to the Jurisdictional Statement.

operations (66 M.C.C. 553), and issued a cease and desist order. The Commission, after finding no "patent ambiguity" in appellant's certificate (App. 6a), ruled (App. 9a–10a) that "finished products of manufacture," such as tractors, traction engines and used foundry machinery, cannot be considered to be "iron and steel articles, as that term is used in motor carrier operating authorities even though they may be manufactured principally of iron and steel."

Upon reconsideration, the Commission, in addition to modifying its order with respect to certain commodities not pertinent here, reopened this and the four prior proceedings in which the predecessor certificates had been issued (*supra*, p. 2), "in order to assist [it] in determining the sense in which the words were used at the time applicant's authority was granted * * *" (App. 14a). After consideration of the evidence in these "basic proceedings," the Commission reaffirmed its earlier determination in a decision (72 M.C.C. 355), stating (App. 18a–19a):

> * * * Contrary to the claims of respondent there is nothing patently ambiguous in the certificate which applicant holds, and for that reason there was no necessity for going back of it in order to determine what was intended. Nevertheless, we have done so, and, as seen, have found nothing to suggest, even remotely, any right to, or any intent to grant, any of the commodities covered by the issues in the title proceeding * * *.

Appellant again petitioned for reconsideration, claiming, *inter alia*, that the decision was inconsistent

with prior pertinent Commission decisions. On May 27, 1958, the Commission issued its second report on reconsideration (76 M.C.C. 467), in which it analyzed the prior decisions and found no inconsistency.

On appeal, a three-judge district court unanimously upheld the Commission's cease-and-desist order. After considering and rejecting the arguments advanced by appellant (App. 42a–48a), the court concluded that the term "iron and steel articles" has "been narrowly construed within the steel and transportation industry" and has "never comprehended finished products of any degree of complexity or manufacture" (App. 48a–49a). It ruled that the Commission's construction of the certificate was in accord with the evidence and "wholly reasonable" (App. 49a).

ARGUMENT

This case is concerned with the narrow issue of the proper interpretation of appellant's certificate. Appellant urges that the phrase "iron and steel articles," as used in its certificate, be given a "lay" or dictionary interpretation and thus be read to cover any article made from iron and steel (Juris. St. 18, 25, 27). We submit, however, that the Commission, relying upon Commission and trade usage and other evidence of record, properly found that the phrase covered rough or semi-finished articles made from iron and steel but did not encompass such finished commodities as tractors and traction engines.

1. Appellant's principal contention (Juris. St. 12–16) is that the Commission improperly based its decision on the *Descriptions* case (*Descriptions in Motor*

Carrier Certificates, 61 M.C.C. 209), a 1952 proceeding in which the Commission adopted commodity descriptions or lists "intended to control the interpretation of certificates issued subsequent to such decision" (App. 19a). But the Commission explicitly recognized that the commodity lists in *Descriptions* are binding only as to certificates issued thereafter (App. 6a, 19a). As the lower court correctly found (App. 46a), the Commission, rather than relying on *Descriptions* as "determinative," simply "noted it as one of several factors for proper consideration." The definitions or lists there established by the Commission were based on the general understanding of the terms within the motor carrier and other industries involved (App. 45a). Thus, the Commission in *Descriptions* stated (61 M.C.C. at p. 245) that the phrase "iron and steel articles" is a commodity description "that has been used for years * * * [and] is understood in transportation circles to mean a list of rough or semi-finished articles made from iron and steel * * *."[3] In the circumstances, the Commission could properly take into account its holding in *Descriptions* as one of several pertinent considerations. Cf. *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561.

2. The "other errors on the part of the Commission" (J. St. 16) alleged by appellant are similarly

[3] The "iron and steel articles" list contained in *Descriptions* is similar to one proposed by several steel manufacturing companies and was approved by an association of carriers engaged in transporting iron and steel articles. The Commission in *Descriptions* stated (p. 247) that the "industry-proposed list does not include every kind of iron and steel article, nor is it so intended," and specifically does not "include farm machinery and many other articles made entirely from steel."

without merit. Contrary to its claim (Juris. St. 16–18), the Commission did not modify its certificate in violation of the provisions of Section 212, 49 U.S.C. 312. The Commission simply *interpreted* the phrase "iron and steel articles," as used in the certificate, to mean rough or semifinished articles made from iron and steel, and not including the "complex mechanical assemblages" (App. 35a–36a), and related items, such as tractors and traction engines, listed in its cease-and-desist order.[1] This Court has made clear that "Commission interpretation of the meaning of a permit, being simply a definitive declaration of what rights existed from the very beginning under the permit, cannot be equated with modification, * * * unless found to be clearly erroneous." *Nelson, Inc.* v. *United States*, 355 U.S. 551, 559, n. 4; see, also, *Jones Truck Lines* v. *United States*, 146 F. Supp. 697, 703 (W.D. Ark.); *Willers* v. *United States*, 133 F. Supp. 270, 275 (D.S. Dak.).

Appellant urges (pp. 18–20) that the Commission erred in considering the certificate to be so patently unambiguous as not to require inquiry into the intent of the framers. As the court below found (App. 46a), "it is clear from the record, from transportation parlance and from various cited cases that there is noth-

[1] While some finished articles are embraced in the phrase "iron and steel articles," they "are of uncomplicated design, with no moving parts, and at a stage of manufacture just beyond the in-the-rough or semifinished classification." *Atlanta-New Orleans M. Freight Co.* v. *Eagle Motor Lines*, 69 M.C.C. 257, 260. Examples of such items, which appellant has authority to transport, are anchor chains, manhole covers, bolts, nails, pipe and castings.

ing patently ambiguous in plaintiff's certificate." But, in any event, the Commission went further (cf. *Nelson, Inc.* v. *United States, supra*, at p. 558, note 3); it did examine the proceedings leading to the certificates "in order to determine what was intended" (App. 18a), and found nothing to indicate "even remotely" any intent to grant authority to transport the commodities in issue or to support contentions that appellant had any "grandfather" rights to transport such goods (App. 15a–19a).

Appellant's claim (Juris. St. 23–26) that the Commission ignored the evidence of its industry witnesses is squarely contradicted by the Commission's decision, which gave "full consideration" to that evidence (App. 21a). The weight to be accorded the evidence was for the Commission (*United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 490–491; cf. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 739), and the court below properly found that "in the light of the testimony of plaintiff's witnesses, * * * the action of the Commission was not arbitrary, capricious or clearly erroneous" (App. 47a).

Finally, appellant argues (Juris. St. 26–29) that the Commission's decision is inconsistent with prior Commission decisions. But appellant cites no case where the Commission had held the complex commodities in question to be covered by the term "iron and steel articles." The Commission in its second report on reconsideration carefully considered (App. 30a–36a) the prior decisions and concluded that none of them supported giving the "broad and all-inclusive

meaning" (App. 34a) to the term "iron and steel articles" contended for by appellant; that, on the contrary, these decisions called for the more restrictive construction it was adopting. It pointed out (App. 36a) that under appellant's interpretation (permitting transport of any commodity made from iron and steel), appellant could carry not only the commodities in issue but "many other articles, such as the typewriters, automobiles, and locomotives * * * [and thus] would be able to invade the fields of * * * numerous other carriers without making the required showing of public need for its service." See *Black* v. *Interstate Commerce Commission*, 167 F. 2d 825, 828 (C.A. 5), certiorari denied, 335 U.S. 818; *Eclipse Motor Lines, Inc., Interpretation of Certificate*, 52 M.C.C. 391, 392.

It is well settled that the Commission's interpretation of its own permits and certificates "is controlling on the courts unless clearly erroneous." *Nelson, Inc.* v. *United States, supra*, at p. 558; see, also, *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876, affirmed, 345 U.S. 980. Plainly, the Commission was not unreasonable in its construction of appellant's certificate.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. The judgment of the district court should be affirmed.

Respectfully submitted.

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